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LOST WITHOUT A TRACE: THE EMPLOYEE'S EMPLOYMENT STATUS

Introduction

Unless and until an annual leave request has been formally and properly approved by the company, an employee should not absent himself from work. Absenting oneself from work without prior permission or failure to report for duty or failure to secure approval for excused absence among others, is a gross violation of discipline. It constitutes a fundamental breach of contract, a serious misconduct, and the employee concerned may be charged for absenteeism and insubordination and may, if found guilty, be discharged from service.

Having said the above, the issue considered in this article is whether the employment relationship of an employee may be terminated on grounds of frustration of contract in a situation where the employee mysteriously disappears without a trace or his whereabouts is unknown. If the answer to the above is in the affirmative, what is the reasonable period before the employer can resort to terminating the employment relationship? For example, Malaysia Airlines flight MH370 mysteriously disappeared with many employees on board. As there was no proof of the sighting of wreckage of the airplane, it is difficult to assume that the airplane had crashed and those on board had died. In the aforesaid circumstances, the employment status of those employees on board arises and what a prudent employer should do in the given scenario. Again, the recent case where an employee never returned after an outstation trip, the employer would be in a dilemma of whether to continue his employment status or to terminate the employment relationship. This is due to the fact that the cause of his disappearance is unknown.

Leave of Absence

Leave from employment is not a matter of right of the employee but is subject to the approval by the employer. Therefore, prior permission is required before an employee takes leave. An employee who absents himself from work for example, on medical leave, is statutorily required to inform his employer of such sick leave within 48 hours of the commencement of the said leave and his failure to so inform his employer shall be deemed to absent himself from work without reasonable excuse. It is wrong for the employee to assume that he could stay away from work without prior approval from and notification to the employer.¹ In *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik*,² the Federal Court held, *inter alia*, that: 'No employee can claim as a matter of right leave of absence without permission and when there might not be any permission for the same. Remaining absent without any permission is gross violation of discipline. Hence, continued absence from work without permission will constitute misconduct justifying the discharge of a workman from service.'

Section 15(2) of the Employment Act 1955³ provides that an employee is deemed to have broken his contract of service with the employer 'if he has been continuously absent from work for more than two consecutive working days,

1 See *Noriah bt Shahidin v Shin-Etsu Polymer (M) Sdn Bhd* [2012] 4 ILJ 409; [2012] 3 ILR 279 where it was stated that claimant could have helped herself by making a telephone call to the company to inform them that she could not attend work on 8 January 2003 owing to her domestic problem. It was wrong for her to assume that she could stay away from work without prior approval from and notification to her employer.

2 [2002] 2 MLJ 27, FC. See also the Employment Act 1955 s 60F(2)(b); *Sykt Telekom Malaysia Bhd v Madurai Veeran a/l Gopal* [1992] 1 ILR 282; *Malaysia Airlines System Bhd v Julais Stephen* [2005] 3 ILR 34.

3 Employment Act 1955 (Act 265).

Civil Procedure



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without prior leave from his employer', unless:
(i) he has a reasonable excuse for such absence;
and (ii) he has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence. In other words, continuous absence from work for more than two days without leave or prior permission from the employer or notifying the employer of the absence or to have obtained the approval of the employer before absenting himself from work, the worker is deemed to have committed a misconduct justifying his dismissal. Further, an employee who was found guilty of being absent from duty without leave, permission or reasonable cause shall not be entitled to be paid any emolument for the period during which he was absent from duty.⁴

Needless to say that before a dismissal from employment on grounds of absenteeism may be effected, the rule of natural justice must be followed in the sense that the employee must be informed of the charge levelled against him and be given the right to be heard. Section 14 of the Employment Act 1955 (Act 265) requires the employer to conduct an immediate investigation and, if the complaint is established and upon the recommendation of the panel of domestic inquiry, the employer may take appropriate action against the accused employee. The Industrial Relations Act 1967 (Act 177) ('IRA') s 20(1) uses the term 'dismissal without just cause or excuse' which implies substantive justification and procedural fairness. However, in light of the numerous decisions of the civil courts and the Industrial Court, a failure to hold a domestic inquiry or a defective domestic inquiry is not fatal but is a mere irregularity.⁵ It is the proceedings before the Industrial Court which is vital for the court to

determine whether the misconduct complained of by the employer has been established and whether the proven misconduct constitutes just cause or excuse for the dismissal.⁶

Presumption of Death

Before addressing the issue of disappearance of employee and termination of employment relationship, it would be worthwhile noting that pursuant to section 18 of the Births and Deaths Registration Act 1957 (Act 299), that the death of every person dying in Malaysia and the cause thereof shall be registered by the Registrar for the registration area in which the death occurred by entering in a register in duplicate in the manner prescribed, such particulars concerning the death. The registration of death of a person is allowed only on condition that the body is found. As for the person whose body is not found, a court order is necessary declaring that the person is legally presumed dead.

Section 108 of the Evidence Act 1950 (Act 56) (Revised 1971) and section 80 of the Syariah Court Evidence (Federal Territories) Act 1997 deals with the presumption of death of a missing person. For example, s 108 provides, inter alia, that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years (or four years under the 1997 Act) by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. As from the above, the waiting period before raising the action is upon the expiry of seven year period (or four years under the 1997 Act). However, if there is circumstantial evidence that would lead a reasonable person to believe that the individual is deceased on the balance of probabilities, as in the mysterious disappearance of MH370, a death certificate may be issued without any court order.⁷

Further, section 52(a) of the Islamic Family Law (Federal Territories) Act 1984 (Act 303)

- 4 *Ismandi bin Labot v Suruhanjaya Perkhidmatan Awam Negeri Sarawak and Others* [2010] MLJU 637.
- 5 In *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753, [1995] 3 CLJ 344, the former Federal Court held that the omission to conduct a due inquiry process will not constitute a dismissal without just cause or excuse. However, in *Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Anor* [1988] 1 MLJ 111, [1988] 1 CLJ, SC it was stated that pursuant to s 20 of the IRA it is important for the court to determine the reasons for the dismissal and the manner of the dismissal.

6 See *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753, [1995] 3 CLJ 344, FC. See also in *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129.

7 See 'Declared death in absentia' at http://en.wikipedia.org/wiki/Declared_death_in_absentia



provides that long absence without knowing the whereabouts of the husband is one of the major circumstances under which a wife may, if she so desires, seek a legal release from her marriage bond by way of divorce or annulment, depending on the particular situation. The above section provides, inter alia, that a woman married in accordance with *Hukum Syara'* shall be entitled to obtain an order for the dissolution of marriage or *fasakh* on the ground that the whereabouts of her husband has not been known for a period of more than one year. Likewise, section 54(1) (c) of the Law Reform (Marriage and Divorce) Act 1976 provides that the petitioner is entitled to apply for divorce when the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition. It is noteworthy however that an unintentional abandonment is not a desertion. For example, if a man is missing in action while serving the army, the wife may not obtain a divorce on grounds of desertion since the husband did not intend to leave the family and flee the marital relationship.

Disappearance of Employee

Whether disappearance of an employee is a justifiable ground to terminate the employment relationship has to be addressed with reference to the doctrine of frustration of contract and its application to employment relationship. A decision has to be made to determine whether or not the employee's desertion was a deliberate act or otherwise. Termination of employment on grounds of employee disappearance is not a decision to be taken lightly as the door to a possible dispute of dismissal without just cause or excuse may be opened. It is so because there is a high possibility that the affected employee might have been kidnapped, a serious crime under the Kidnapping Act 1961 (Revised 1989) Act 365, section 3 which carries a sentence of 'death or imprisonment for life and shall, if he is not sentenced to death also be liable to whipping'.⁸

⁸ The above section provides: 'Whoever, with intent to hold any person for ransom, abducts or wrongfully confines or wrongfully restrains such person shall be guilty of an offence and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping.'

Other circumstances would be for example where after a serious accident, the employee wanders aimlessly, unable to remember who he is or where he came from, lost in a dense forest, adrift at sea, suffering from amnesia, et cetera.

The situation however would be different if there is very clear evidence that the employee had demonstrated abandonment of employment in which case a long absence from the workplace by itself is a justifiable ground for dismissal. As noted earlier, absenting oneself from work without prior permission or failure to report for duty or failure to secure approval for excused absence among others, is a gross violation of discipline. It constitutes a fundamental breach of contract, a serious misconduct, and the employee concerned may be charged for absenteeism and insubordination and may, if found guilty, be discharged from service. Hence, the intention not to return to work is one of the essential elements in concluding that a desertion has taken place. In the aforesaid circumstances however, an employer should convene a disciplinary enquiry before taking a decision to dismiss.

However, the assumption herein is that the disappearance of the employee was not the employee's own doing. In other words, the employee did not expressly or impliedly indicate that he did not intend to return to work. In such a situation, the termination of employment relationship would only be possible by invoking the doctrine of frustration of the employment contract. The doctrine provides the employer with a solution to the problem of prolonged absence in employment. As stated earlier, an employee who is unable to report for work due to no fault of his cannot legitimately be supposed to have deserted/abandoned work.

Frustration of contract of employment

A contract which has been rendered physically impossible to fulfil by a change of circumstances after its formation may be discharged pursuant to section 57(2) of the Contracts Act 1950. The above section provides: 'A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful'. The contract is deemed frustrated



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when there is a change in the circumstances which renders the contract legally or physically impossible of performance. The frustrating event must take place without blame or fault on the side of the party seeking to rely on it.⁹

In *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd*,¹⁰ Gopal Sri Ram J (as he then was) described the term 'frustration of contract' as: 'a certain set of circumstances arising after the formation of the contract, the occurrence of which is due to no fault of either party and which renders performance of the contract by one or both parties physically and commercially impossible. The Court regards these sets of circumstances as releasing the parties from any further obligations. Where the entire performance of a contract becomes substantially impossible without any fault on either side, the contract is prima facie dissolved by the doctrine of frustration'.

The Federal Court in the case of *Goh Yew Chew & Anor v Soh Kian Tee*,¹¹ stated: 'The doctrine of frustration is relevant when it is alleged that a change of circumstances after the formation of the contract renders it physically or commercially impossible to fulfil the contract. The doctrine is not concerned with initial impossibility which renders a contract void ab initio, as where a party to a contract undertakes to perform an act which, at the time the contract is made, is physically impossible according to existing scientific knowledge and achievement. Again, in *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor*,¹² the Federal Court stated: 'A contract does not become frustrated merely because it becomes difficult to perform. If a party has no money to pay his debt, it cannot be considered impossible to perform as it is not frustration. Neither can he plead frustration because the terms of the contract make it difficult to interpret. If it cannot be performed or becomes unlawful to perform, then the party who is to perform his part of the bargain can plead frustration. The

9 See *Anson's Law of Contract*, 28th Edition at page 530.

10 [2007] 4 MLJ 201, p 206; [2007] 3 CLJ 695, p 702.

11 [1970] 1 MLJ 138, p 141.

12 [2009] 6 MLJ 293; [2009] 6 CLJ 430.

doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract was entered into. A contract is frustrated when subsequent to its formation a change of circumstances renders the contract legally or physically impossible to be performed.'

The circumstances frustrating the contract have to be determined objectively. The question to be asked is whether there has been a radical change in the actual effect of the promises of the parties construed in the light of the new circumstances.¹³

The table below illustrates the application of the doctrine of frustration of contract in employment relationship.

No	Case	Reasons for termination
1	<i>Sathiaval a/l Maruthamuthu v Shell Malaysia Trading Sdn Bhd</i> ^[1]	The plaintiff's detention for two years at <i>Pusat Pemulihan Akhlak</i> , Pulau Jerejak was a justified ground to terminate the employment contract on grounds of frustration of contract.
2	<i>Roslee bin Hadi v Petrochemicals (M) Sdn Bhd</i> ; ^[2] <i>Pauline Peck v Saratim Insurance Agency Services Sdn Bhd</i> ; ^[3] <i>Kempas Edible Oil Sdn Bhd v Abu Bakar bin Talib</i> . ^[4]	The claimant's illness or incapacity which is permanent or prolonged in nature will interfere materially with the proper performance of the contract. Hence, it was held to constitute a justifiable ground to terminate the employment relationship on grounds of frustration of contract.

[1] [1998] 1 MLJ 740.

[2] [2012] 3 ILJ 213; [2012] 2 LNS 0434.

[3] [2010] 3 ILR 630.

[4] [2008] ILJU 539; [2008] 3 ILR 11.

It is submitted that an employee's disappearance from employment is a ground justified to terminate the employment relationship on grounds of frustration of contract. It must be added that in a situation where the employee's whereabouts is unknown, it would be a futile exercise for the employer to issue ultimatum letters to return to

13 *Ramli bin Zakaria & Ors v Government of Malaysia* [1982] 2 MLJ 257.



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work or face dismissal, or to adhere to the rules of natural justice and procedural fairness as a precondition for a dismissal.

However, the assessment of a period of delay sufficient to constitute frustration is a question of fact and every case depends on its own circumstances. In *Hare v Murphy Brothers Ltd*,¹⁴ Lord Denning noted the applicable test to determine frustration of employment contract: 'In the case of a contract of employment you must look at the length of time he has been employed, the position which he held, and of course, most important of all, the length of time which he is likely to be away from his work and unable to perform it — and the importance of getting someone else to do his job meanwhile'. It is admitted that the employer has to make their management decisions and the court will only be concerned with whether such decision was fair in the circumstances of the case.

Having said the above, it is submitted that it would be prudent for the employer to wait for a reasonable period of time before ruling the employee's disappearance as a ground sufficient to constitute frustration of contract. In determining the appropriate period of absence, due weight must be given to the employee's length of service and the position held, among others. It would also be unreasonable to expect the employer to hold the position vacant for a prolonged period of time. Hence, as there is no case law guidance on this issue, it is submitted that a reasonable period before deciding to terminate the services of a

mysteriously disappeared employee is between three to six months from the date the affected employee was supposed to have returned to work and the said period of absence could be considered as being on special leave without pay. The above period should not be deemed excessive given the fact that the employer would need to exercise caution by making all the necessary inquiries before terminating the services. The above measures are necessary as the employer has to be careful to ensure that it does not put itself at the risk of an unfair dismissal claim. In the interim, the employer could obtain a temporary employee to replace the disappeared employee. It must be added that the law recognised the employer's prerogative to conduct its business affairs according to its own discretion and judgment. Therefore, it is absolutely within the employer's managerial discretion to take back the employee in employment after his long mysterious disappearance.

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14 [1974] 3 All ER 940.

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CIVIL PROCEDURE

[1] Civil Procedure — Summary judgment — Whether any triable issues raised — Whether solicitor had breached its duty and undertaking as a stakeholder by releasing the documents prior to the fulfillment of all the conditions imposed in the undertaking

This was the plaintiffs' application for summary judgment against the third defendant pursuant to O 14 of the Rules of Court 2012 for damages, general and aggravated, as a result of the third defendant's alleged breach of undertaking and duties as a stakeholder. The plaintiffs were shareholders in the second defendant company. By a letter dated 25 June 2009 ('the first agreement'), the first defendant agreed to purchase the shares of the first plaintiff in the second defendant. It was agreed that as precondition before a formal Share Sale Agreement is completed and shares transferred, the first defendant should procure the settlement of all debts owed to the sundry creditors who had lent money to the second defendant. This agreement was supplemented by a stakeholder letter dated 19 February 2011 ('the second agreement') from the third defendant undertook to release the presigned share transfer forms and pre-signed letters of resignation of the existing directors ('the documents') to the first defendant only upon the fulfillment of the first defendant of three conditions, thus: (i) all debts to all sundry creditors had been fully settled; (ii) the debt to Maybank had been settled; and (iii) the plaintiffs' entitlements to the main sum had been fully settled. The plaintiffs alleged that the third defendant had breach its fiduciary duties as a stakeholder when it released the documents to the first defendant prematurely in breach of their undertakings given. The third defendant alleged that they should be allowed to defend this case in a full trial, contending, inter alia, that the plaintiffs had no locus standi to initiate this action against them, there had been no breach of undertaking and/or stakeholder duties and that the plaintiffs had not suffered any damage.

Held: (1) The plaintiffs had satisfied the preliminary requirements as laid down in an application for summary judgment. Therefore, the burden shifted

to the third defendant to satisfy the court why summary judgment should not be entered against them. (2) The duty of a stakeholder is to hold the stake *in medio* pending the future outcome of a future event; that he holds it as trustee for both parties to await that event, and that until that event is known it is his duty to keep it in his own hands. It was not disputed that the third defendant, as stakeholder, was authorised under the second agreement to release the documents to the first defendant only upon the fulfillment of the third conditions. The affidavit evidence showed that the second and third conditions had not been satisfied when the documents were released to the first defendant by the third defendant. At the time when the documents were released the debt to Maybank had not been settled. Although it had been deposited with the third defendant, it was only settled four months after the release of the documents. Similarly, although the first defendant had issued a cheque to the third defendant in the sum of RM605,000, the said sum was not released to the plaintiffs on the instruction of the first defendant, hence it could not be said that the main sum had been fully settled. The third defendant had therefore breached its duty as stakeholder by releasing the documents prematurely in contravention of its undertaking. (3) The third defendant's challenge on the issue of locus standi was without merit as the second agreement was an undertaking given to the vendor and purchasers in the first agreement, who were the first plaintiff and the first defendant, whereas the second plaintiff was a legal representative of the estate of the deceased. Summary judgment was accordingly entered against the third defendant. Damages to be assessed. Order accordingly.

Datuk Haji Abdul Karim bin Abdul Ghani & Anor v M-Con Engineering (M) Sdn Bhd & Ors (unreported, 22 February 2013; Civil Suit No 22NCC-300-03/2012), [2013] MLJU 595

[Annotation: *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, FC (refd); *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400, SC (refd); *Kuldip Singh & Anor v Lembaga Letrik Negara & Anor* [1983] 1 MLJ 256, OCJ (refd); *Toh Theam Hock v Kemajuan Perwira Management Corps Sdn Bhd* [1988] 1 MLJ 116, SC (refd); *Dato' Seri Au Ba Chi v Malayan United*



Finance Bhd & Anor [1989] 3 MLJ 434, HC (refd); *Samat Din & Partners v Bank Pembangunan (M) Bhd* [1997] 3 MLJ 542, CA (refd); *Annamalai a/l Subramaniam v V Muthusamy & Tan (sued as a firm)* [2000] 7 MLJ 541, HC (refd); *Amarjit Singh a/l Kartar Singh v Kung Boon Chin & Ors* [2010] 8 MLJ 149, HC (refd); *Thomson v Commissioner of Police* [1997] 2 All ER 762 (refd).

Rules of Court 2012 O 14.]

[2] Civil Procedure — Summary judgment — Whether any triable issue raised — Banking facilities — Change in shareholding without prior consent of the Bank

This was the plaintiff's application for summary judgment for the sum of RM6,262,749.07 being banking facilities granted to the defendant. The plaintiff had cancelled the banking facilities on the ground that there was a substantial change in the shareholding and directorship of the defendant without the prior knowledge or consent of the plaintiff, in breach of the terms of the loan agreement.

Held: It was stipulated in the letter of offer that the defendant as the customer should not without first obtaining the prior written consent of the Bank allow any change in the existing shareholders or shareholdings. Failure to obtain prior consent from the Bank might cancel the facilities. There was a breach by the defendant therefore the plaintiff was entitled to cancel the facility. The Certificate of Indebtedness adduced was clear and lucid. There was nothing to indicate of suggest any manifest error. The defendant had failed to raise any triable issues therefore this application was allowed with cost.

Malayan Banking Bhd v Heveafil Sdn Bhd (unreported, 17 June 2013; Suit No 22NCC-1398-09/2012), [2013] MLJU 636

[Annotation: *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, FC (refd); *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400, SC (refd); *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685, FC (refd).

Rules of Court 2012 O 14.]

[3] Civil Procedure — Subpoena — Setting aside

This was the applicant's application to set aside the writ of subpoena *Ad Testificandum and Duces Tecum* issued against her by the plaintiff requiring her to attend court for trial. The grounds relied were thus: (i) the applicant was under a duty of confidentiality under r 1206.1 of the Rules of Bursa Malaysia Securities Berhad ('Bursa Rules'); (ii) public policy dictates that evidence relating to Bursa's findings and/or investigations in respect of matters which have not been closed should not be made public as this may jeopardize the proper discharge of the Bursa's duties; (iii) the evidence sought by the plaintiff was irrelevant to the pleaded case; (iv) the subpoena was speculative in nature as it did not specifically identify the documents requested from the applicant and/or Bursa; (v) the applicant's evidence was unnecessary for a fair disposal of the suit or to save costs. The plaintiff's claim against the defendant for the purported negligence in respect of alleged rogue trading on the part of the defendant's employee Carl Wong at the material time. In defence, the defendant alleged that Carl Wong was the plaintiff's and not the defendant's agent. His actions were 'outside his authority, actual or otherwise, and does not bind the defendant'. It was also contended that the plaintiff had failed to carry out proper and regular reconciliation and verification of his trading accounts.

Held: It is trite that where no useful result would be obtained by the attendance of a witness, the subpoena should be refused. It was difficult to see how the applicant was able to render any assistance in those issues given that the plaintiff was actually seeking to elicit evidence on manipulation of account by Carl Wong, disposal of his securities, how payments were effected and the procedures and policies adopted by the defendant in its back office and trading floor at the material time. Surely such evidence ought to be with the defendant and in its domain and not with third parties as the applicant or Bursa. The applicant could not give any information material or relevant of the nature sought by the plaintiff. It was difficult to see how the evidence related to the investigations conducted by Bursa on Carl Wong had anything to do with those



issues. Hence, this application was accordingly dismissed with costs.

Chong Chit Eng v RHB Investment Bank Bhd (formerly known as 'RHB Sakura Merchant Bankers Bhd') (unreported, 24 July 2013; Civil Suit No 22NCC-874-06/2012), [2013] MLJU 841

[**Annotation:** *ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors* [2013] 3 MLJ 35, CA (refd); *Dea Ai Eng (P) v Dr Wong Seak Shoon & Anor* [2007] 2 MLJ 357, HC (refd); *Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679 (refd).

Capital Markets and Services Act 2007 s 360.]

[4] Civil Procedure — Pleadings — Amendment — Statement of claim — Whether delay in pleading fraud in connection with some tactical manoeuvre

This was the plaintiff's application to amend the statement of claim. In this action, the plaintiff claimed for loss and damage as the concrete U drains supplied by the defendant to the plaintiff were not according to specification. The amendment related to the fact that the plaintiff ordered Non-Standard U-Drains, the costs of Standard and Non-Standard U-Drains and the reasons why the drains supplied did not follow the specifications of the plaintiff. There were also fresh allegations of fraud and cheating based substantially from facts already pleaded.

Held: (1) This application was made almost four years after the statement of claim was filed. The plaintiff admitted that the facts were well within their knowledge since 2003. The Court was drawn to the conclusion that the facts giving rise to the proposed allegation of fraud were known at the time of the original pleading and that the delay in pleading fraud was in connection with some tactical maneuver. (2) The proposed amendment would also change the suit from one character to another and inconsistent character. The application would be highly prejudicial to the defendant and was accordingly dismissed.

Vivamaster Sdn Bhd v Associated Concrete Products (M) Sdn Bhd (unreported, 12 July 2013; Civil Suit No AT2-22-1456 of 2009), [2013] MLJU 851

[**Annotation:** *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, FC (refd); *Dato' Tan Heng Chew v Tan Kim Hor and another appeal* [2009] 5 MLJ 790, CA (refd); *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348, HC (refd).]

[5] Civil Procedure — Summary judgment — Whether any triable issues raised — Application for a declaration that the plaintiff was entitled to repudiate the agreement for the purchase of a motor vehicle on the ground that it was not roadworthy

This was the plaintiff's application for summary judgment under O 14 of the Rules of Court 2012 for a declaration that the plaintiff was entitled to repudiate the sale and purchase agreement, that the motor vehicle Peugeot 207 SV 1.6(A) bearing registration number WWR 6138 ('the car') was not roadworthy and unfit for its purpose and damages. The plaintiff purchased the car from the defendant on 25 April 2012. The plaintiff contended that despite inspections carried out by the defendant's service centre on 2 May 2012, 10 May 2012 and 15 May 2012, the problems to the car could not be resolved. On 19 May 2012 the plaintiff met with an accident. The car was towed to Puspakom. The plaintiff claimed that the brake was not functioning based on a copy of report issued by Puspakom. The defendant maintained that the car was in good condition and that the problems encountered by the plaintiff were during the validity of the manufacturer's warranty period. The defendant contended that as the case involved technical issued, it should be tried in full.

Held: (1) The plaintiff had satisfied the preliminary requirements in an application for summary judgment, viz, the defendant had entered appearance, the statement of claim had been served on the defendant, the affidavit in support was in compliance with O 14 r 2 of the Rules of Court 2012. The burden was therefore shifted to the defendant to satisfy the court why judgment should not be entered against them. (2) Whilst admitting that the plaintiff made numerous visits to the defendant's service centre on various complaints, the defendant contended that it was not the brake failure that caused the accident and that the brake failure was caused by the impact after the collision. However, the defendant did



not adduce any evidence at all to support their contention. The onus rested on the defendant to prove the car was roadworthy, which the defendant failed in discharging such a burden. No evidence was put forth by the defendant to substantiate the alleged technical issue that should be heard in an open court. Accordingly the plaintiff's application was allowed with costs.

Chua Hee Tuan v Nasim Sdn Bhd (unreported, 1 August 2013; Civil Suit No 22NCVC-91-01/2013), [2013] MLJU 903

[Annotation: *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, FC (refd); *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400, SC (refd); *Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd* [2012] 1 MLJ 27, CA (refd); *Henderson v Henry E Jenkins & Sons & Anor* [1969] 2 QB 188 (refd).

Rules of Court 2012 O 14.]

[6] Civil Procedure — Striking out — Statement of claim — Limitation as a shield and not a sword — Whether a debt that is time-barred is extinguished

In this action, the plaintiff sought an order to compel the defendant to hand over all security documents, to execute all documents to discharge the subject property and to remove all information pertaining to the plaintiff's debt to the defendant. This was the defendant's application under O 18 r 19(a) and/or (b) and/or (d) of the Rules of Court 2012 to strike out the plaintiff's writ and statement of claim dated 11 March 2013. The defendant had commenced legal action vide the Kuala Lumpur High Court Suit No D-22-855 of 2009 ('the suit') which was struck out by the High Court on the ground of statute barred. The defendant's appeal to the Court of Appeal and leave to appeal to the Federal Court were dismissed. The plaintiff contended that since the defendant's claim was struck out, his debt towards the defendant was also extinguished, hence the present action. The defendant argued that although the suit had been struck out, the debt would continue to subsist. The decision in striking out had only prevented the defendant from executing any legal remedies to recover the said debt from the plaintiff.

Held: (1) It is trite law that limitation can only be used as a shield and not a sword. Statutes of

limitation which bar the remedy, but not the right, are rules of procedure only. Surely it would be a grave injustice to the defendant if the plaintiff were entitled to recover the subject property free from encumbrances whilst the loan still remained unsettled, merely because the defendant's remedy had been barred by limitation. (2) In any event, the plaintiff's prayers in the present suit could have been brought in and litigated during the hearing of the defendant's claim in the suit. The present action was therefore barred by the doctrine of *res judicata*. This action was accordingly struck out with costs.

Thiagarajan a/l Pavadai v CIMB Bank Bhd (unreported, 16 May 2013; Civil Suit No 22NCVC-249-03/2013), [2013] MLJU 910

[Annotation: *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651, CA (refd); *Othman & Anor v Mek* [1972] 2 MLJ 158, FC (refd); *24 Halsbury 3rd Ed*, p 181 (refd); *AN Hassan v Bumiputra Commerce Finance Bhd* [2003] 6 CLJ 301 (refd); *CIMB Bank Bhd v Muzlan Ariffin* [2011] 8 CLJ 945 (refd); *Tan Siew Chin Sdn Bhd v Perbadanan Pengurusan Sri Pantai* [2013] 2 MLJ 513 (refd);

Rules of Court 2012 O 18 r 19.]

[7] Civil Procedure — Judgments and orders — Application to set aside judgment in default of appearance — Service by way of ordinary registered post instead of prepaid AR registered post — Certificate of non appearance was taken out only after judgment was entered — Notice of motion was not served on defendant — Whether notice of motion to enter judgment could be disposed off by the senior assistant registrar — Whether judgment in default of appearance ought to be set aside

The defendant sought to set aside a judgment in default of appearance in a medical negligence suit on grounds that the service of the writ of summons and statement of claim was irregular and invalid and not in accordance with O 10 r 1(1) of the Rules of the High Court 1980. There was no certificate of non-appearance produced by the plaintiff when praying for judgment to be entered on 9 May 2012 as required under O 13



r 7 of the Rules of the High Court 1980. It was only taken out on 4 December 2012. The notice of motion to enter judgment was improper and invalid because it should have been made by way of summons and not by motion as per O 13 r 6(3) of the Rules of the High Court 1980; affidavit in support of the notice of motion should not be deposed by the plaintiff's counsel; the notice of motion was never served on the defendant and should not have been heard ex-parte.

Held: (1) The service on the defendant as the law stood, could only be affected by the use of the prepaid AR registered post and not by way of ordinary registered post. It was quite clear there was obvious non-compliance to serve the defendant on the mode as prescribed by O 10 r 1 of the Rules of the High Court. (2) The said certificate of non-appearance was only taken out by the plaintiff on the 4 December 2012, whereas the judgment in default was obtained on the 9 May 2012. The plaintiff did not disclose that at the time when he extracted the said judgment he was not in possession or even filed for certificate of non appearance. This non disclosure was very damaging to the plaintiff's case. (3) The senior assistant registrar further did not have the jurisdiction nor authority to hear and dispose of matters such as motion to set aside or to enter judgment in default of appearance. Motions are heard by a High Court judge in open court. Under O 8 r 2, except where an application may properly be made ex parte, no motion shall be made without previous notice to parties affected thereby. (4) Further the use of the word 'must' in O 13 r 6(3) indicate that this requirement to serve on the defendant against whom it is sought to enter judgment is a mandatory provision. This word is present in both the 1980 and 2012 Rules of the High Court. It is an absolute obligation to comply. It was wrong for the plaintiff to inform the court that the motion was an ex parte application when clearly it was not so. Hence defendant's application allowed with costs of RM10,000.

Lo Kui Chen @ Lo Kui Jin v Dr Kalayarasu a/l Subramaniam (practising under the name and style of Klinik Khoo) (unreported, 14 August 2013; Suit No SDK-22-60/12-2011), [2013] MLJU 968

[Annotation: *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581, CA (refd); *Duli Yang Amat Mulia Tunku Ibrahim*

Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149, FC (refd); *Pacific Inter-link Sdn Bhd v Pemilik Kapal atau Vesel 'Makatsarija'* [1999] MLJU 721; [2000] 2 CLJ 679 (refd).

Rules of the High Court 1980 O 1A, O 2, O 8 r 2, O 10 r 1(1), O 12 r 4, O 13 rr 6, 6(3), 7, O 62 rr 4(2), 10, 400.]

[8] Civil Procedure — Declaration — Whether correct procedure in the circumstances — Application to declare void an insurance policy on the ground that there were elements of fraud based on second respondent's statutory declaration and an earlier police report — Second respondent had already retracted his statutory declaration and the earlier police report — Matters were still being heard at the sessions court — Whether 96(3) of the Road Transport Act 1987 applicable — Whether court ought to grant such declaration

On 22 May 2011 an accident allegedly occurred involving the motorcycle owned by the third respondent ('R3') which was ridden by the second respondent ('R2') in Penang, and another motorcycle which was ridden by the first respondent ('R1'). R2 lodged a police report on the accident ('the first police report'). As a result of the accident, R1 filed an action in the Butterworth sessions court against R2 and R3. R2 and R3 alleged that after they had filed the defence, two adjusters from the applicant, threatened R2 and brought R2 to the magistrate's court, Slim River, Perak to make a statutory declaration ('SD') and a second police report denying the involvement of the motorcycle of R2 and R3 in the said accident with R1's motorcycle. The hearing of the session court case had proceeded. R2 and R3 were informed by the investigating officer ('IO') that he had been called twice to give evidence regarding the accident. On both occasions, the IO had confirmed the involvement of the motorcycle of R2 and R3 with the motorcycle of R1 in the accident. R2 was dissatisfied with the applicant's allegations against him. He lodged a third police report to confirm his involvement in the accident and retracted his second police report. R2 denied that he had made a false police report to help R1



in his case. He maintained that the accident did really happen between his motorcycle and R1's motorcycle, as he had stated in his first police report, and in his defence in the case and in the third police report. The applicant applied for a declaration to declare void the insurance policy for R2 and R3's motorcycle on the ground that there were elements of fraud which could be a vitiating factor in any insurance coverage.

Held: (1) The application could not be allowed since there were serious disputes on fact ie whether there was fraud, or conspiracy between R1 and R2 to lodge a false police report on the alleged accident. (2) The fact remained that R2 had subsequently retracted the contents of his SD and lodged the third police report to that effect. Therefore, clearly the whole basis for the applicant's application had been removed and no longer existed. (3) Under s 96(1) of the Road Transport Act 1987 ('the RTA'), the insurer is liable to pay for any judgment sum given against the insured person who is covered under the policy issued by the insurer. The applicant should not be allowed to obtain the declaration under s 96(3) of the RTA since the application for such declaration was made after, and not before the date the liability was incurred ie before the date of the alleged accident. Hence, application dismissed.

Pacific & Orient Insurance Co Bhd v Muhammad Kamil bin Abd Shakur & Ors (unreported, 14 October 2013; Suit No 24 NCVC-1154-07/2013), [2013] MLJU 1042

[Annotation: *Kurnia Insurans (M) Bhd v Nik Mohd Faizul Bin Nik Mustafa & Anor* [2013] 9 MLJ 675 (refd); *Kurnia Insurans (M) Bhd v Alunan Pesona Sdn Bhd and Anor* [2011] MLJU 554 (refd).

Road Transport Act 1987 s 96(1), 96(3); Rules of Court 2012 O 5 r 2.]

[9] Civil Procedure — Jurisdiction — Matters relating to Islamic religion — Subject matter of leave application relates to validity or otherwise of Fatwa — Whether civil court has jurisdiction to hear matter

The applicant sought leave to file an application for judicial review related to the Fatwa of 'Hukum Ajaran Jurozan bin Abdul Latif @ Ahmad Walidie

Yang berpusat di Madrasah At Taqwa Batu 14 Hulu Langat Selangor' which was prepared by the fatwa committee pursuant to s 47 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('the enactment') on the direction of HRH the Sultan of Selangor and which was duly gazetted pursuant to s 48(6) of the enactment in 2 February 2012 ('the Fatwa').

Held: In the light of art 121(1A) of the Federal Constitution ('FC'), read in conjunction with art 74 of the FC and Item 1 of the List of the State List, it was clear that the subject matter fell clearly within the jurisdiction of the Shariah Court. This court being a civil court was not seized of jurisdiction. Hence, the application for leave was dismissed.

Persatuan Anak-Anak Yatim Malaysia (melalui wakilnya Dr Idris bin Musa) v Jawatankuasa Fatwa Negeri Selangor Majlis Agama Islam Negeri Selangor & Anor (unreported, 23 September 2013; Notice of Motion No 25-15-02 of 2013), [2013] MLJU 972

[Annotation: *Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* [1999] 5 MLJ 618, HC (refd); *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228, SC (refd); *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, SC (refd); *Godfrey Philips (M) Sdn Bhd v Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan Malaysia* [2011] 9 CLJ 670 (refd); *Lina Joy v Majlis Agama Islam Wilayah & Anor* [2004] 2 MLJ 119 (refd); *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681 (refd); *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890 (refd); *R v Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107 (refd); *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor* [1999] 1 MLJ 489 (refd); *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442 (refd).

Administration of the Religion of Islam (State of Selangor) Enactment 2003 ss 47, 48, 48(6); Federal Constitution art 74, 74(2), 121(1A), Ninth Schedule, Item 1, List II-State List; Rules of Court 2012 O 53 r 3.]



[10] Civil Procedure — Mode of commencement — Originating summons — Application to continue proceedings as if cause begun by writ of summons — Whether likelihood of any substantial dispute of fact in proceedings

The plaintiff by way of an originating summons sought several declaratory orders, among others, regarding the plaintiff's exclusive right, as a registered owner of a property ('Lot 46') pursuant to s 44(1)(a) of the National Land Code ('the NLC') and the encroachment and trespass committed by the first defendant on part of Lot 46. The first defendant applied by way of a summons in chambers pursuant to O 28 r 8 of the Rules of the High Court 1980 for, among others, an order for the proceedings in the cause commenced by way of originating summons to continue as if the cause had been begun by writ of summons. The first defendant had applied to the Wilayah Persekutuan Kuala Lumpur land office administrator ('land administrator') for creation of a right of way ('ROW') over part of the plaintiff's Lot 46. It was the first defendant's contention that on 2 February 2010, the land administrator had allowed first defendant's application for the ROW ('land administrator's order'). On 29 June 2011, the first defendant received a letter from the land administrator informing that the final decision and the order creating the private ROW over part of Lot 46 had not been made ('land administrator's impugned action'). On 3 August 2011, the first defendant appealed pursuant to s 418 of the NLC against the land administrator's impugned action which was dismissed by the High Court. However the High Court ordered the land administrator to re-open the enquiry regarding first defendant's application to create a private ROW from the first defendant's land at Lot 48 through a part of the plaintiff's land at Lot 46 and to give an appropriate decision in accordance with the provisions of the NLC. The plaintiff contended that the land administrator had already ruled that there was no private ROW in favour of defendant through Lot 46. There was no endorsement of a ROW on Lot 46 pursuant to s 391 of the NLC.

Held: (1) It was clear that to date, there was no court order or land administrator's decision confirming that first defendant had a legal ROW over part of Lot 46. There was no appeal filed by

first defendant against the court order dated 18 June 2013. That order was therefore final and binding regarding all issues of ROW in relation to Lot 46, unless, subsequent to this, there was an approval given by the land administrator to first defendant for his application. (2) If at all first defendant wished to pursue its application before the land administrator for the ROW, it had to do so in the re-opening of the enquiry to be conducted by the land administrator pursuant to the order of the High Court dated 18 June 2013. Thus, there was no question of first defendant having a ROW over Lot 46 at this point in time. In the present circumstances, there was no likelihood that this would amount to a substantial dispute of fact in the proceedings for this originating summons. (3) The matter could be commenced by way of an originating summons since it fell within the scope of O 5 r 4(1)(a) or (b) of the Rules of Court 2012. Hence, application dismissed.

Perbadanan Pengurusan Villa Putra v Mayland View Sdn Bhd & Anor (unreported, 4 September 2013; Originating Summons No 24-NCVC-2649-10 of 2011), [2013] MLJU 1046

[Annotation: *Ng Wan Siew v Teoh Sin* [1963] 1 MLJ 103 (refd); *Ong Ah Moy v Nga Ah Fan & Ors* [1978] 1 MLJ 177 (refd); *Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30 (refd).

National Land Code ss 34, 44(1)(a), 391, 418; Rules of the High Court 1980 O 5 rr 3, 4(1), 4(2), O 28 r 8; Rules of Court 2012 O 5 r 4(1)(a), (1)(b), (2)(b).]

[11] Civil Procedure — Pleadings — Striking out — Franchise business — Purported representation made by defendant — Allegation of purported representation never made even after termination of franchise agreement — Whether plaintiff's contention bare assertion

Perbadanan Nasional Berhad ('PNS') and Ministry of Entrepreneurs and Cooperative organised a Women Graduate Franchise Program and attended by one of the plaintiff's director. The plaintiff's director was required to choose a franchise business from one of the franchisors listed with PNS failing which a fee of RM15,000 will be imposed by PNS on the director for attending the program. The purported



representation made by the defendant was that the defendant purportedly convinced the plaintiff that the franchise outlet offered by the defendant would bring an initial return of not less than RM5,000 a month ('purported representation'). With such purported representation the plaintiff subsequently entered into a franchise agreement with the defendant. The plaintiff contended that the defendant purportedly failed to fulfill its obligations under the said franchise agreement. The damages and relief claimed by the plaintiff were said to be losses suffered by it arising from the purported representation made by the defendant. The defendant applied to strike out the plaintiff's claim under O 18 r 19(1)(b) or (d) of the Rules of Court 2012.

Held: (1) At all material times, prior to the commencement of this action, the plaintiff had never alleged that the defendant made the purported representation before the franchise agreement was executed in August 2006. The plaintiff also did not raise any allegation of the purported representation after the termination of the franchise agreement in February 2008. The plaintiff's contention was an afterthought. (2) The plaintiff also failed to disclose the identity of the person who purportedly made the purported representation on behalf of the defendant, or the time, date or place the purported representation was made. Therefore, the plaintiff's contention was obviously a bare assertion and without merits. (3) The purported breach alleged by the plaintiff was irrelevant to the relief claimed by the plaintiff as the relief sought was said to be the losses suffered by the plaintiff arising from the purported representation and not breach of the franchise agreement. There was no documentary evidence to support the plaintiffs allegation of the purported breach, even though the plaintiff claimed it took place since August 2006. (4) The fact that the plaintiff even continued to act as a franchisee of the defendant until termination of the franchise agreement by the defendant clearly showed the contradiction between its allegation and the plaintiff's conduct. Hence the application was allowed.

HNR Trading Sdn Bhd & Ors v Harian Shoes Sdn Bhd (unreported, 18 October 2013; Writ Summon No 22-NCVC-131-02 of 2013), [2013] MLJU 1080

[**Annotation:** *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 (refd).

Rules of Court 2012 O 18 r 19(1)(b), (d).]

[12] Civil Procedure — Security for costs — Place of residence of plaintiff — Address of plaintiff in countries not listed in First Schedule of Reciprocal Enforcement of Judgments Act 1958 — Whether plaintiff ought to provide security for costs

The defendant applied for security for costs pursuant to O 23 of the Rules of Court 2012 amounting to RM160,000. The defendant contended that the first plaintiff was a private limited company incorporated in Riyadh, Kingdom of Saudi Arabia whereas the second plaintiff was a private limited company in Dubai, United Arab Emirates. The addresses stated in the writ and statement of claim were incomplete and vague whereby the first plaintiff merely stated its PO Box number and the second plaintiff merely stated the industrial area in which it accepted correspondence.

Held: (1) The addresses as stated in paragraphs 4 and 5 of the defendant's affidavit were in fact the plaintiffs' registered addresses and these addresses were located in countries which were not listed in the First Schedule of the Reciprocal Enforcement of Judgments Act 1958. It was therefore clear that both the plaintiffs were indeed ordinarily residents out of jurisdiction. (2) In the absence of any other argument or evidence to show that the plaintiffs had assets within the jurisdiction, it could only be concluded that the plaintiffs had none within the jurisdiction. Hence the application was allowed.

Ink Products Co Ltd v IEC Plant Engineering Sdn Bhd (unreported, 18 October 2013; Civil Suit No 22-NCVC-267-03 of 2013), [2013] MLJU 1082

[**Annotation:** *Faridah Begum Bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404; [1995] 2 CLJ 951 (refd); *Raju Rajaram Pillai (t/a Dhanveer Enterprise) v MMC Power Sdn Bhd & Anor* [2000] 6 MLJ 551; [2000] 4 CLJ 189 (refd).

Reciprocal Enforcement of Judgments Act 1958 First Schedule; Rules of Court 2012 O 23, O 23 r 1.]

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